

DOCKET NO.: FST CF 15-5014808-S	)	SUPERIOR COURT
	)	
WILLIAM A. LOMAS,	)	JUDICIAL DISTRICT OF
	)	STAMFORD/NORWALK
Plaintiffs,	)	
	)	AT STAMFORD
versus	)	
	)	
PARTNER WEALTH MANAGEMENT, LLC	)	
KEVIN G. BURNS, JAMES PRATT-HEANEY,	)	SEPTEMBER 29, 2016
AND WILLIAM P. LOFTUS,	)	
	)	
Defendants.	)	
	)	
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	)	
PARTNER WEALTH MANAGEMENT, LLC,	)	
KEVIN G. BURNS, JAMES PRATT-HEANEY,	)	
AND WILLIAM P. LOFTUS,	)	
	)	
Counterclaim Plaintiffs,	)	
	)	
versus	)	
	)	
WILLIAM A. LOMAS,	)	
	)	
Counterclaim Defendant.	)	

**DEFENDANTS/COUNTERCLAIM PLAINTIFFS’ OPPOSITION TO LOMAS’  
MOTION FOR THE APPOINTMENT OF A COMMISSION AND FOR  
LEAVE TO TAKE THE DEPOSITION IN NEW YORK OF DAVID LAGASSE, ESQ.**

Defendants and Counterclaim Plaintiffs Partner Wealth Management, LLC (“**PWM**”), Kevin G. Burns, James Pratt-Heaney, and William P. Loftus (collectively, “**Defendants**”) submit this opposition to Plaintiff and Counterclaim Defendant William A. Lomas’ (“**Lomas**”) motion for the appointment of a commission to permit him to take discovery from David Lagasse, Esq. (“**Lagasse**”) – who was PWM’s corporate counsel and the Defendants’ prior counsel in this litigation. For the reasons, set forth below, Lomas’ motion should be denied.

## **PRELIMINARY STATEMENT**

Jury selection is scheduled to begin in this case on November 9, 2016. Lomas' motion is nothing more than a desperate, last-ditch attempt to breathe life into his moribund claims, which have unraveled throughout the extensive discovery that has already been conducted in this case. Not only are communications between Lagasse and PWM privileged, Lagasse has no non-cumulative evidence to provide in this case.

## **BACKGROUND**

On January 1, 2015, PWM adopted an amended and restated operating agreement (the “**2015 PWM Agreement**”). The 2015 PWM Agreement replaced and superseded PWM's prior operating agreement, which had been adopted on or about November 30, 2009 (the “**2009 PWM Agreement**”).

According to Plaintiff, the “gravamen of [his] claim is that Defendants have refused to purchase Lomas' equity interest in [PWM], in accordance with a formula specified in the PWM Limited Liability Company Agreement dated November 30, 2009,” (the “2009 PWM Agreement”). (Mot. ¶ 2). According to Plaintiff, “Defendants amended the [2009 PWM Agreement] in a manner adverse to Lomas” (Mot. ¶ 3) and “enlisted the assistance of Attorney Lagasse” to accomplish this end (Mot. ¶ 4). Additionally, prior to the adoption of the 2015 PWM Agreement, a meeting was held on December 18, 2014 (the “**December 18 Meeting**”) to discuss the proposed 2015 PWM Agreement. In attendance at the December 18 Meeting were Lomas, Burns, Pratt-Heaney, Loftus, non-party Jeff Fuhrman, and Lagasse, a partner at the law firm Mintz Levin.

Lomas now seeks to depose Lagasse in connection with his corporate representation of PWM because Lagasse “was a participant in, and a witness to” the December 18 Meeting. (Mot.

12). In particular, Plaintiff seeks to depose Lagasse concerning:

1. Lagasse’s representation of PWM, Loftus, Burns or Pratt-Heaney from January 1, 2013 through January 14, 2015.
2. All communications between Lagasse and Loftus, Burns, Pratt-Heaney and/or Jeffrey Fuhrman related to his representation of PWM from January 1, 2013 through January 14, 2015.
3. The aforementioned meeting that Lagasse attended on December 18, 2014.

And Plaintiff also seeks the production of four categories of documents from Lagasse:

1. All documents related to Lagasse’s representation of PWM, Loftus, Burns or Pratt-Heaney from January 1, 2013 through January 14, 2015.
2. All communications between Lagasse and Loftus, Burns or Pratt-Heaney related to your representation of PWM from January 1, 2013 through January 14, 2015.
3. All documents related to the meeting held on December 18, 2014, including any handwritten notes, memorandum or meeting minutes you prepared in connection with, or during that meeting.
4. All engagement letters between you and PWM, Loftus, Burns and/or Pratt-Heaney.

Not only is the sought after information shielded by the privilege, but Lomas, in the course of seeking this commission, entirely fails to mention several salient facts that have come to light during the course of the extensive discovery that has already been conducted in this case.

While Lomas noticed his intent to withdraw as a member of PWM on or about October 13, 2014, his withdrawal did not become effective until January 14, 2015. (*See* Counterclaim Compl. Ex. D). The 2015 PWM Agreement became effective January 1, 2015 – while Lomas was still a member of PWM – and therefore applies to and binds Lomas. Indeed, Lomas cannot

deny this: although Lomas does not like the duly adopted 2015 PWM Agreement, his entire theory of recovery is predicated on the fact that he was a member of PWM in 2015.

Additionally, discovery has confirmed that the members of PWM adopted the 2015 PWM Agreement by a valid super-majority vote in accordance with Article VII of the 2009 PWM Agreement – which requires a 65% majority in order to amend the 2009 PWM Agreement. Lomas has admitted exactly this at his deposition:

- Q. And you sent out on October 13, 2014 a notice that you would withdraw from the company effective January 14, 2015, correct?
- A. **Yes.**
- Q. And there was a vote prior to January 14, 2015 on a new limited liability agreement, correct?
- A. **Yes.**
- Q. And one of the things that was being proposed was that the method by which a partner would be paid upon withdrawing would change, correct?
- A. **Yes.**
- Q. You voted against it, correct?
- A. **I did.**
- Q. And the other three partners voted in favor of it, correct?
- A. **Yes.**
- Q. And a new operating agreement came into being, correct?
- A. **Based upon that assumption – [Attorney Objection to Form]**
- A. **At that point the three quarter vote provided there would be under that agreement a new operating agreement, an amended operating agreement.**
- Q. And have you seen that new operating agreement?
- A. **I have.**
- Q. And it's dated as of January 1, 2015, correct?
- A. **Yes, it is.**
- Q. And you testified earlier that you worked as a partner in this business and did not in any way quit or stop working or fulfilling your duties all the way through to January 14th, close of business January 14, 2015, correct?
- A. **Yes.<sup>1</sup>**

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<sup>1</sup> See Deposition Tr. of William Lomas taken on July 18, 2016 (“**Lomas Dep. Tr.**”) at pp. 191-192 (emphasis added).

Although Lomas alleges in his Amended Complaint that this proper corporate action was a “pretext” to permit the Defendants to breach their “contractual and fiduciary obligations to Lomas,” the evidence shows that the members of PWM had been engaged in discussions since at least the spring of 2013 to amend the operating agreement, but that Lomas, as part of an on-going fraud against PWM and the other members, willfully and intentionally delayed and hindered the adoption of the 2015 PWM Agreement. (*See* Counterclaim Compl. ¶¶ (Counterclaim Compl. ¶¶ 17-30; Exs. I, J, N, O-S, T-V).

Not only does the 2015 PWM Agreement control the valuation of Lomas’ interest, Counterclaim Plaintiffs are also entitled to set off against any payments to Lomas the damages caused to them by Lomas’ fraud and breach of his contractual and fiduciary obligations, as well as their attorneys’ fees for this action.

For the reasons set forth below, Lomas’ motion should be denied.

## **ARGUMENT**

### **I. The Information Sought By Lomas Is Protected by the Attorney-Client Privilege and/or Work-Product Doctrine**

PWM – and only PWM – formally retained Lagasse to serve as its corporate counsel on or about December 18, 2013 in connection with: (1) the drafting and execution of an amendment to the 2009 PWM Agreement, which the members adopted in or around May 2014 (the “2014 Amendment”); and (2) in connection with the drafting and execution of the 2015 PWM Agreement, which the members adopted on January 1, 2015 by a super-majority vote. (*See* Lagasse Aff. dated Aug. 19, 2015 ¶¶ 6-8).<sup>2</sup> Therefore, PWM is the holder of the privilege with respect to the information sought by Lomas.

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<sup>2</sup> A true and correct copy is attached hereto as Exhibit A.

But Lomas may not depose Lagasse nor obtain the sought after documents because PWM asserts the attorney-client privilege over its communications with Lagasse.

Plaintiff concedes in his motion that Lagasse was PWM's attorney – not his. (Mot. ¶ 6). Although Plaintiff states that he was a member of PWM at the time for which he seeks disclosure from Lagasse (*id.*), that fact is irrelevant. Courts routinely hold that the attorney-client privilege belongs to the limited liability corporation, not to minority members and certainly not to former members such as Plaintiff. *See, e.g., In re PWK Timberland, LLC*, 549 B.R. 366, 370 (Bankr. W.D. La. 2015) (“the fact that Movants were members of PWK prior to January 2011 does not provide them with an independent ground to access PWK's privileged communications because the privilege belongs to PWK, not its members”); *Montgomery v. eTrepid Technologies, LLC*, 548 F. Supp. 2d 1175, 1187 (D. Nev. 2008) (“the privilege belongs to the corporation, can be asserted or waived only by management, and that this power transfers when control of the corporation is transferred to new management”).

Plaintiff does not cite a single authority in his motion that would even suggest that he is within the ambit of the privilege. Because PWM is the privilege holder and it is asserting the privilege, Lomas' motion should be denied.

## **II. The Sought After Discovery Would Be Cumulative and/or Duplicative**

In addition to the fact that the information sought is shielded from disclosure by the privilege, the sought after discovery would be unnecessarily cumulative and duplicative.

First, with regard to the discovery Plaintiff seeks concerning the December 18 Meeting, not only was Lomas at that meeting, but so were Burns, Pratt-Heaney, Loftus, and non-party

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When the case was commenced by Plaintiff in or around June 2015, Lagasse served as litigation counsel to the Defendants. Lagasse's firm, Mintz Levin, was replaced as litigation counsel on or about March 1, 2016. Lagasse's affidavit was submitted in support of his *pro hac vice* application.

Jeffrey Fuhrman. Lomas has now deposed all of these individuals. Testimony by Lagasse as to his recollection of the December 18 Meeting would, therefore, be duplicative and cumulative.

Moreover, while Plaintiff seeks disclosure of notes taken by Lagasse at the meeting, those notes are exempt from disclosure under the attorney-client privilege and attorney work product doctrines. These notes contain Lagasse's mental impressions and are not discoverable.

Last, with regards to the sought after engagement letters, Plaintiff **already has** a copy of the December 18, 2013 engagement letter signed by PWM and Lagasse. Indeed, Plaintiff attached a copy of this engagement letter as Exhibit B to the affidavit he filed in this case on August 11, 2015. Second, although Plaintiff is seeking all engagement letters between Lagasse and any of the Defendants, the engagement letters concerning Lagasse's representation of the Defendants in this lawsuit are irrelevant and as Lagasse stated in his affidavit in support of his *pro hac vice* application, he only represented PWM prior to the commencement of this lawsuit.

### **CONCLUSION**

Plaintiff seeks to take improper and unnecessary discovery so that the trial will be delayed while Defendants continue to labor under a harsh pre-judgment remedy. This 11th hour request for discovery from PWM's corporate attorney not only seeks information protected by the attorney-client privilege, but would be cumulative and/or duplicative of the discovery had to date.

Accordingly, Defendants and Counterclaim Plaintiffs respectfully request that the Court deny Plaintiff's motion seeking issuance of a commission to take discovery from attorney Lagasse.

Dated: September 29, 2016  
New York, New York

DEFENDANTS/COUNTERCLAIM PLAINTIFFS  
PARTNER WEALTH MANAGEMENT, LLC,  
KEVIN G. BURNS, WILLIAM P. LOFTUS, AND  
JAMES PRATT-HEANEY

By: /s/ Edward D. Altabet  
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing (together with exhibits) was caused to be emailed and mailed on September 29, 2016 to:

Thomas Rechen, Esq.  
McCarter & English, LLP  
CityPlace I  
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/s/Edward D. Altabet  
Edward D. Altabet

# **EXHIBIT A**

DOCKET NO. FST-CV-155014808-S : SUPERIOR COURT  
WILLIAM A. LOMAS : J.D. OF STAMFORD/NORWALK  
VS. : AT STAMFORD  
PARTNER WEALTH MANAGEMENT, LLC  
ET AL. : AUGUST \_\_, 2015

**AFFIDAVIT OF DAVID R. LAGASSE**

STATE OF NEW YORK )  
) ss: Manhattan  
COUNTY OF NEW YORK )

DAVID R. LAGASSE, being duly sworn, deposes and says:

1. I am over eighteen (18) years of age and believe in the obligations of an oath. I have personal knowledge of the statements made herein.
2. I submit this Affidavit in further support of the defendants' motion to admit me to appear *pro hac vice* on behalf of and to represent the common interests of the defendants in this matter, Partner Wealth Management, LLC ("PWM") and Kevin G. Burns, James Pratt-Heaney and William Loftus (the "Individual Defendants") (collectively, "the Defendants"), to expand on the statements I made in my initial affidavit in support of the motion, and in reply to

the objection and affidavit filed by the plaintiff, William A. Lomas ("the Plaintiff") dated August 11, 2015.

3. I am an executive compensation attorney and have extensive experience designing, drafting and negotiating performance driven compensation and equity arrangements for senior-level executives and partners in partnerships.

4. I have worked with Jeff Fuhrman since 1999 both as an individual client and in his capacity as a senior executive officer of two prior companies.

5. Based upon my experience and past professional work with him, Mr. Fuhrman reached out to me after he became the Chief Operating Officer and Chief Financial Officer of LLBH Private Wealth Management, LLC in 2013. In that position, Mr. Fuhrman was responsible for managing the finances and operations of both LLBH and Partner Wealth Management ("PWM"), an entity owned by the Individual Defendants and the Plaintiff, which contracted with LLBH to provide LLBH with professional investment management services.

6. I was formally retained by PWM on or about December 18, 2013. Initially, Mr. Fuhrman asked me to work with him to help the PWM partners modify their compensation structure under PWM's Limited Liability Company Agreement (the "Agreement") from one in which each partner received 25% of the firm's income to a compensation structure that included a substantial performance component. I also understood that once the compensation

structure had been changed, PWM's partners desired to amend and restate the Agreement to implement a number of changes, including changing the buy-out provisions governing a member's withdrawal from PWM.

7. I completed my work with regard to the PWM's compensation structure in or about April 2014. An amendment to the Agreement in that regard was formally adopted by the members of PWM on or about May 1, 2014.

8. At this time, Mr. Fuhrman next sought advice on the ways the partners' desired to change their Agreement and how to conduct the discussions among the partners in order to reach agreement on those changes. Among other things, Mr. Fuhrman and I discussed how to modify the price PWM would pay to a departing partner in order to buy back the departing partner's ownership interest in PWM so that those provisions in the Agreement would mirror the previously agreed to restructuring of how the annual cash flow of PWM is distributed to its four partners. I assisted Mr. Fuhrman to develop a presentation to show the partners at their regular July 2014 Executive Committee meeting addressing a number of issues for discussion and agreement among the partners, including the change in the repurchase price. A copy of the presentation is attached as "EXHIBIT 2" to the Affidavit of Jeffrey Fuhrman, dated August 19, 2015 ("Fuhrman Affidavit").

9. Those discussions continued among the partners through the summer and fall of 2014, well before the Plaintiff noticed his withdrawal from PWM on October 13, 2014. I did not participate in any of the meetings with the Individual Defendants, the Plaintiff and Mr. Fuhrman.

10. My participation was limited to discussions with Mr. Fuhrman about the process and advice on how to move the discussions forward productively.

11. At Mr. Fuhrman's request, I did attend a meeting with the Individual Defendants, the Plaintiff and Mr. Fuhrman on December 18, 2014 for the purpose of explaining the changes the partners had agreed to make to the Agreement, a red-lined copy of which changes is attached hereto as "EXHIBIT 3" to the Fuhrman Affidavit, submitted with this motion. The revisions to the Agreement were extensive and included changes pertaining to the repurchase price to be paid to a withdrawing member.

12. The Plaintiff did approach me individually prior to the meeting to inform me that he now opposed the adoption of any changes to the Agreement. I encouraged the Plaintiff to make his position known to the Individual Defendants and Mr. Fuhrman.

13. When the formal meeting began, I informed the Individual Defendants, the Plaintiff and Mr. Fuhrman that I was present at the meeting as counsel for PWM and that I was not representing any of them individually. I added that they were free to retain their own

counsel to represent them in connection with adopting the amended and restated Agreement and to review the revised draft. I then noted that the Plaintiff had a statement to make and the Plaintiff reiterated his position that he was opposed to adopting an amended and restated Agreement to everyone present.

14. Other than this short discussion with the Plaintiff prior to the meeting on December 18, I did not speak with the Plaintiff individually or obtain any confidential information from him.

15. I did not take minutes of the meeting, but did take brief notes on a few changes to be made to the amended and restated Agreement based on the discussions and agreements made during the meeting among the participants. The notes consist of a single page of an 8 x 14.5 inch legal pad. Local counsel for the Defendants is in the process of negotiating the disclosure of those notes with Plaintiff's counsel, so as to preserve any attorney-client privilege or other privilege or protection provided by law as may apply to the same.

16. Prior to seeking to represent the Individual Defendants in this matter pursuant to this motion, I have not acted as counsel for any of them or for the Plaintiff. When I stated in my affidavit that I had a long relationship with the PWM and the Individual Defendants, I meant that I have represented PWM continuously for a year and a half. In addition, to the matters discussed in this affidavit, PWM has sought advice from me as their attorney in a

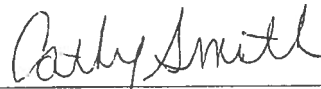
number of matters involving employment and compensation issues. During this time, I have learned PWM's business and worked with Mr. Fuhrman and the Individual Defendants in their capacity as the managers of LLBH.

17. It is my understanding that for the foregoing reasons, the Defendants have requested that I represent their common interests in this matter. I possess specialized skill and knowledge with regard to the Defendants' affairs regarding the Agreement, as amended, by majority consent of PWM's members, which will be of material benefit to the Defendants in defending this action.



David R. Lagasse

Subscribed and sworn to before me this 19<sup>th</sup> day of August, 2015.



Notary Public ~~7~~ Commissioner of the  
Superior Court

CATHY SMITH  
Notary Public, State of New York  
No. 01SM5037025  
Qualified in New York  
Commission Expires December 12, 20 18



**CERTIFICATE OF SERVICE**

I hereby certify that on this 19<sup>th</sup> day of August 2015, I caused the foregoing to be served via electronic mail on counsel as follows:

Thomas J. Rechen  
McCarter & English, LLP  
City Place I, 185 Asylum Street  
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trechen@mccarter.com

/s/ Richard J. Buturla  
Richard J. Buturla